1. Commencing on September 7, 1991, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $504.40, such compensation to be computed in accordance with Section 8(a) of the Act.

2. The Employer shall receive credit for compensation previously paid to the Claimant as a result of his December 3, 1990 injury on and after September 7, 1991.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred between May 14, 2002 and the date of this decision. Counsel shall also resubmit his previously filed fee petition.

A

DAVID W. DI NARDI

District Chief Judge

Boston, Massachusetts

DWD:dr

1. Claimant filed a claim under the Act for the May 3, 1984 injury on December 20, 1993. Cl. Ex. 24. Claimant filed claims for the other five discrete injuries on February 26, 1994. Cl. Exs. 25-28, 30. He also filed a claim for "multiple," unspecified injuries on February 26, 1994, alleging total disability commencing September 7, 1991. Cl. Ex. 29.

2. With regard to the injuries sustained on October 16, 1985 (cervical strain), December 3, 1990 (cervical strain), and August 4, 1986 (right knee), claimant did not lose any time from work and continued to perform his usual work as a tank tester.

3. The record establishes Liberty Mutual was the carrier on the risk for employer from March 1, 1981, through August 31, 1986, and that employer became self-insured as of September 1, 1988.

4. With regard to the issue of total disability, the employers initial burden under the state act, that of coming forward with nothing more than medical evidence evincing an ability to work, is significantly lighter than that required under the Longshore Act, which requires employer to establish the availability of suitable alternate employment by providing evidence of realistically available positions, either at its facility or on the open market, that claimant can perform given his age, education, vocational background and physical restrictions. **CNA Ins. Co. V. Legrow**, 935 F.2d 430, 434, 24 BRBS 202, 208(CRT) (1St Cir. 1991); **see Plourde**, 34 BRBS at 48.

5. Under Maine law, once employer establishes claimants physical capacity to work, claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a larger partial disability award. Although a claimant under the Longshore Act bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, **see CNA Ins. Co. v. Legrow**, 935 F.2d 430, 24 BRBS 202(CRT) (1St Cir. 1991); **Rogers Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), **cert. denied**, 479 U.S. 826 (1986), this burden does not arise until employer has established the availability of suitable alternate employment. **See Plourde**, 34 BRBS at 48.

6. For the reasons stated in **Plourde**, 34 BRBS at 48-49, we hold that the instant case is distinguishable from **Acord**. We note, however, that while the doctrine of collateral estoppel does not bar all benefits in these claims, it would apply to any findings of fact made by the state Board which are common to the claims filed under the Maine Act and the Longshore Act and which were fully litigated and necessary to the judgment in the prior proceeding. For instance, collateral estoppel would apply to the State Boards determination that claimants complaints of low back pain are not related to his May 3, 1984, work injury as the ultimate burden of proof on causation under the state act and the Longshore Act is the same, i.e., claimant has the

ultimate burden to establish causation. **See Acord**, 125 F.3d 18, 31 BRBS 109(CRT).

7. We observe, moreover, that if applicable, collateral estoppel would not preclude claimants entitlement to all disability benefits under the Act, as the administrative law judge found, but would require the administrative law judge to conclude that claimants 1991 knee injury was partially disabling in accord with the State Boards finding.

8. We note that carrier raised this issue before the administrative law judge. See 33 U.S.C. 913(b)(1). Its argument is focused on these particular dates of injuries as they occurred during the time that Liberty Mutual was the carrier on the risk.

9. Employer did not argue before the administrative law judge that the claim related to the February 14, 1991, work injury was not timely filed. **See** 33 U.S.C. 91 3(b)(1). Thus, we need not address the issue of whether the filing of a state claim tolls the one-year filing requirement of Section 13(a), pursuant to Section 13(d), 33 U.S.C. 913(d), as the two federal claims that were the subject of state claims were filed pursuant to Section 13(a). **But see Bath Iron Works Corp. v. Director, OWCP [Acord]**, 125 F.3d 18, 31 BRBS 1 09(CRT) (1St Cir. 1997); **Cf. Ingalls Shipbuilding Div. v. Hollinhead**, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978).

10. The timeliness of the claim for bilateral carpal tunnel syndrome, filed on August 18, 1993, was not challenged below. **See** 33 U.S.C. 913(b)(1). Moreover, self-insured employer did not raise in its response a challenge to the timeliness of the claim for the December 3, 1990 cervical injury. Thus, we will not address this issue, as employer did not preserve any affirmative defense in this regard.

11. In addition, self-insured employer raised below the validity of the claim filed with regard to the "multiple injuries" allegedly sustained on September 7, 1991, since, for among other reasons, it is unclear whether this is actually a separate claim or not. **See** Cl. Ex. 29. As employer suggests, there is no specific or gradual injury to any body part described, and the administrative law judge on remand should address employers contentions regarding the nature of this claim.

12. In **PEPCO**, 449 U.S. 268, 14 BRBS 363, the Supreme Court held that a claimant who is permanently partially disabled due to an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. 908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21) for a loss in wage earning capacity. **See also Barker v. US. Dept. of Labor**, 138 F.3d 431, 32 BRBS 171(CRT)(1st Cir. 1998).

13. We note that either carrier or self-insured employer will be entitled to a credit under Section 3(e), 33 U.S.C. 903(e), for all payments claimant received for the same injury or disability under the state law. **See DErrico v. General Dynamics Corp.**, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993).

14. In the interests of expediting this decision, as I shall shortly hang up the gavel, I shall be adopting certain parts of the parties' briefs. I have thoroughly considered all of the arguments and my adoption of certain arguments forecloses, **IPSO FACTO**, adoption of contrary arguments.